

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1438

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

HERBERT JACOBS,

Defendant-Appellant.

*On Appeal from a Judgment of Conviction in the
Southern District of New York*

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

This is an appeal from a judgment convicting the appellant of conspiracy to violate 18 U.S.C. 894 (first count of the indictment) and a violation of 18 U.S.C. 894 and 2 (second count of the indictment, after a jury trial before the Honorable Morris Lasker, a Judge of the Southern District of New York and jury.

As a consequence the appellant was placed on probation and fined in the sum of \$2,500.00.

ISSUES AND QUESTION INVOLVED:

1. Does the predicate statute apply to the facts of this case, or alternatively, was said statute unconstitutional as applied to the facts of this case; is said statute void for vagueness?

THE GOVERNMENT'S CASE AGAINST
THE APPELLANT:

The government relied on one Jack Napoli as its main source of evidence against the appellant. As the facts hereinafter set forth will disclose, this case arose from a gigantic hoax or fraud perpetrated by the government's prime witness. Put more colloquially Napoli put a "sting" on the appellant

Napoli's criminal background is amply set forth in the record both by the government and the defense (4A-6A).*

On February 12, 1976 he contacted the appellant by telephone. He told Jacobs who was a jeweler that he was interested in buying a diamond engagement ring (6A-8A). He then met the appellant (8A). He introduced himself as Jack Caringi, that name of course being false. However, he later admitted that he used his mother's maiden name. Prior to this meeting, he never met the co-defendant Russell Bufalino. However, apparently to lull the appellant he stated that he knew Bufalino (8A, 9A, 10A, 57A).

Napoli heard of the appellant through one Larry Bufalino (9A). As a result of the first phone call, Jacobs called him later when he, Napoli, was living in New Jersey (10A).

*() This refers to the pagination of the appendix furnished by the appellant.

Ultimately, following another telephone conversation, an arrangement was made for a meeting the following Saturday between Napoli and the appellant at the appellant's place of business at 62 W. 47th Street. At the meeting Napoli introduced himself as Caringi and a discussion then was had as to a purchase. After displaying some of the jewelry, Napoli selected a 4 carat diamond which was put in a setting in two cocktail rings (11A, 12A). Napoli in turn gave Jacobs a check which was concededly worthless in the amount of \$6,000.00. He told the appellant to hold the check and that ne, Napoli, would call him over the weekend to confirm whether he wanted the jewelry or not (12A).

Having thus gained the rings by a ruse, Napoli sold two of the rings, keeping one (12A, 13A). A few days later Napoli told the appellant to deposit the check (14A). At a still later conversation Napoli told the appellant that he wanted to buy more jewelry (14A).

He went to the appellant's office, driving there with his wife, but he saw the appellant alone (14A). He was able to get a ring from the appellant for \$7,500 telling the appellant that he would let him know later whether he was going to keep the ring. That very day Napoli sold this ring for \$3,300 (14A-16A).

A few days later Napoli was spaeking to Jacobs over the telephone. Jacobs by this time ascertained that the initial check given to him for \$6,000 was worthless. Napoli told Jacobs that the maker of the check gave it to him in good

faith (16A, 55A). Later Napoli called Jacobs telling him that he would give him the \$6,000 that the first check represented (17A). Napoli also told Jacobs that his brother wanted a ring and then Napoli arranged to have his brother call the appellant telling him that he wanted to buy some jewelry and a meeting was arranged (17A).

The following Saturday, Napoli and his brother drove to Manhattan. Napoli saw his brother go into the building where Jacobs business was located and emerge 15 minutes later with a ring (17A, 18A). As can be expected by now, Napoli got the ring and sold it for \$2,000 (18A, 19A).

After some days passed the appellant called Napoli and reminded him that he wasn't paid the initial \$6,000 (19A, 20A).

Despite all these transactions and conversations, Napoli arranged with three other named persons and all went to the appellant's place of business (20A, 21A). This was pursuant to a scheme that Napoli arranged with the other persons. Thus, Napoli told them that he was getting diamonds from the appellant, owed him money but that "if I had something to show him or something to give him, maybe he would give it to me. So they had cashier's -- teller's checks, stolen teller's checks, and they thought, they would use those." (22A, 23A).

At a meeting arranged with the appellant, Napoli spoke to the appellant and was accompanied by only one of the other three friends of his. Napoli told the appellant that a friend of his was looking for a "diamond"; the appellant reminded him of former aborted transactions and Napoli told the appellant that his friend would pay for what he bought (23A, 24A). Napoli's friend then selected a stone and gave the appellant a teller's check. The appellant made a call and rejected the check as being worthless (24A, 25A).

Jacobs demanded the money that was owed and told Napoli that he was going to see Russell Bufalin; the appellant made two phone calls asking whether Bufalino was present. In a third phone call the appellant called a John Francis. Napoli overheard him saying that Napoli was present at the office and told him that he was a friend of Bufalino also recounting about the worthless check (26A, 27A).

The next day the appellant told Napoli that somebody who knew him, that is Napoli, stated that Napoli knew Russell Bufalino. Jacobs then offered to sell another item and later delivered a stone to the witness (28A).

Napoli meanwhile told Jacobs that he would make good the defaults (28A, 29A).

In regard to the last purchase by Napoli, Napoli gave the jewel to a Frank Marmo, telling Marmo to sell the item and give him part of the proceeds (30A).

At a subsequent discussion with the appellant over the telephone, the appellant told Napoli that Russell Bufalino told him that he didn't know the witness (30A, 31A). The appellant also told Napoli to return the stones or pay. The appellant also added that if Napoli were present he'd throw him out of the window (30A, 31A).

In a subsequent telephone conversation the appellant told the witness that the matter "would be out of his hands" and that he wanted the money (32A).

Subsequently Napoli received a call from a "Mike" (32A, 33A). In connection with this, Napoli recalled at trial that Jacobs told him he would be getting a call from "Mike" (33A).

At a later meeting with the appellant the co-defendants, Barber and one Lapidura and Sciandra, Sciandra asked the witness when he was going to repay the money or return the items (34A).

Next, Napoli at trial identified certain tape recordings of telephone conversations with the appellant (35A-37A, Government's Exhibits 2, 2B and 2C). Other tapings were received in evidence as Government's Exhibits 3, 3C (45A, 46A).

However, Napoli also recalled at trial that at a meeting with the appellant, the appellant told him he didn't know what was going on and that "they would take care of everything" (44A, 45A).

On May 10, 1976, Napoli called the appellant. He related that the appellant told him "they were mad" because Napoli was not conforming to an arrangement he previously made with them (49A-51A). In the same telephone conversation, the appellant upon being told by Napoli that his mother-in-law heard that he was going to be killed, the appellant told him that no one's going to kill him and that as long as everything gets straightened out he would live, or he won't be killed. That he, Jacobs, could have "gone to the law" but didn't go. Jacobs reassured Napoli that nothing was going to happen (51A). Jacobs also told Napoli to contact his mother-in-law who was concerned about Napoli's children (51A).

On cross examination Napoli conceded he had no intention of ever paying Jacobs (61A). That the initial check given to Jacobs by Napoli was made by Napoli's brother and that Napoli told his brother what he was going to use it for (62A).

It will be noted it was also elicited from Napoli that this check was fully made out, including the amount, prior to the time that Napoli saw the jewelry he procured from the appellant and that at the time the check was made out Napoli didn't even know the price of the jewelry (63A). Furthermore, Napoli admitted that his brother knew the check was worthless (64A).

Napoli having thus gotten himself into debt and being unable to extricate himself then took recourse to the federal authorities (80A).

POINT I

THE STATUTORY PREDICATE UNDERLYING
THE CONVICTIONS HEREIN WAS MISAPPLIED
TO THE FACTS OF THIS CASE, OR,
ALTERNATIVELY, THE RELEVANT STATUTES
WERE UNCONSTITUTIONALLY APPLIED AND
VIOLATIVE OF THE TENTH AMENDMENT TO THE
FEDERAL CONSTITUTION.

The 10th Amendment to the Federal Constitution provides that the powers not delegated to the federal government by the Constitution are reserved to the States or to the People unless the States are constitutionally disabled from acting in regard to the reserved powers.

Both counts of the indictment, namely the first count, charging a conspiracy and the second count charging the substantive acts, were founded on 18 U.S.C. 894 which in its relevant portion states as follows:

"Collection of Extensions of Credit by Extortionate Means.-(a) Whoever knowingly participates in any way, or conspires to do so, in the use of extortionate means:

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the non repayment thereof..."

18 U.S.C. 891 which contains the definitions of the expressions used in the relevant statutes states in part that:

"(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred."

"(2) The term 'creditor' with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit."

"(7) An extortionate means is any means which involves the use, or an express or implied threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

These statutes were enacted under the popularly known Consumer Credit Protection Act.

The legislative intent would appear in the legislative comments found in No. 2 U.S. Code Congressional and Administrative News of 1968 at page 2025, et seq., parts of which read as follows:

"Title II- Extortionate Credit Transactions. Title II ...is aimed directly at the activities of organized crime. This Title,...makes it a federal offense to make extortionate extensions of credit, to finance the making of extortionate extensions of credit, or to collect any extensions of credit by extortionate means."

"An extortionate extension of credit is defined as any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person,..."

"Similarly, an extortionate means is defined as any means which involve the use, or an express or an implied threat of use, or violence or other criminal means to cause harm to the person..."

CONSTITUTIONAL BASIS

"Article I, Section 8 of the Constitution expressly empowers Congress to make 'uniform laws on the subject of bankruptcies'. 'In the exercise of this power, Congress has enacted the Bankruptcy Act, which confers on any debtor the statutory right, with certain qualifications to be discharged of his debts by applying substantially all of his property towards their repayment. It is obvious, however, that obligations as to which there is an understanding that they may be collected by extortionate means, or which are actually so collected are not susceptible of being 'discharged' in bankruptcy in any meaningful sense. Such transactions thus deprive the debtor of a Federal statutory right, and at the same time defeat one of the principal purposes of the Bankruptcy Act, which is to afford insolvent persons the opportunity to make a fresh start. Thus, it seems clearly within the power of Congress to protect the Federal statutory right and to assure that the Bankruptcy Laws will be carried into execution by enacting legislation to prohibit extortionate credit transactions. In addition, there is ample evidence that such transactions are being carried on on a large scale and that they have a substantial impact on interstate commerce..." (See pages 2025, 2026).

Napoli was a fraud and earned his living by committing various types of larceny e.g. larceny by false pretenses, trick and device, or misrepresenting a state of mind. See in one instance, Section 155.0 of the Penal Law of the State of New York and Section 155.05 of the said Penal Law, subdivision (2)(a), and (d), as well as Section 165.00 of the Penal Law of the State of New York.

It would appear that the legislative history of the Act shows that it was an enabling statute under the Constitutional grant to Congress to provide for relief of debtors by means of insolvency statutes or bankruptcy statutes.

Napoli, if anything, could put a small businessman like Jacobs in bankruptcy or insolvency. By some twist, Jacobs was a defendant and Napoli a government witness. Here, the state of facts show that the "creditor" could be rendered insolvent by the "debtor", Napoli.

It is submitted that the "debtor" was not given any "extension of credit". That Napoli took and created an extension of credit by his guile. The appellant never voluntarily extended credit to Napoli because if he knew of the true facts and knew Napoli's true state of mind and motives, there would be no extension of credit or any credit. To construe the act to the state of facts in this given case, would be to thwart the legislative intention underlying the statute.

The statute was initially sustained in Perez v. U.S., 402 U.S. 146 (1971). There the Consumer Protection Act passed Constitutional scrutiny. The basis for the decision was that it would appear that facially the Act is valid and comports with the commerce clause of the Federal Constitution and is within the bankruptcy jurisdiction of the federal government, at pages 149-150, 151. As to the commerce power, it was held

that usury is within the class of activities that falls within the commerce clause e.g. usury affects interstate commerce, at pages 152, 153. In Perez, however, the victim was a neighborhood butcher. Here the defendant is a small businessman as the victim was in Perez. It is submitted that the larcenist, Napoli, without more and who offended the state law is hardly a "debtor" within the meaning of the Act. It can scarcely be doubted that a thief and therefore a debtor is within the beneficial provisions of the federal insolvency laws. Put another way, Napoli could not be discharged in bankruptcy because of his criminal acts. It is submitted that insolvency laws were not made to protect economic parasites.

Because Perez was a usurer, the Act was nevertheless held to apply to his local usury activities. In other words, the Act, even if local in nature was held within the coverage of the commerce power of Congress and the statute under consideration.

However the ruling in Perez, it is put, cannot be extended to vindicate the "self-help" it is claimed the appellant visited upon Napoli. 18 U.S.C. 891 defines the phrase as to how credit may be extended by providing in subdivision (1) that it doesn't matter how the "debt or claim" originated by the phrase "however arising".

It is put, that this phrase was not the battering ram to obliterate the flexible boundaries contained in Federalism. To construe the involuntary origination of the debt as is the case here as one "however arising" would enable Congress to control the activities of a victim of a street mugging, or the excessive measure undertaken by a person who is a victim of a local assault or local crime or even negligence, purely all within the concern of the local states. As stated in Rewis v. U.S. 401 U.S. 808 (1971), at page 812, it being stated in part that:

"...In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could over extend limited federal police resources, and might well produce situations in which the geographic origin of customers as a matter of happenstance, would transform relatively minor state offenses into federal felonys..."

The appellant does not cite Rewis to put forth a claim that the government here failed to establish an nexus with the commerce power of Congress. Rather, the expression merely shows the view of the Supreme Court as to acts well within the state domain.

The phrase under consideration, to wit, "however arising" means that where a debt is incurred, the origin of the debt or the incurring of the claim need not be accompanied by a simultaneous bilateral understanding that extortionate means would be utilized as extra legal security. To hold otherwise would Federally criminalize self-help by victims of crimes or people whose property is taken or purloined by illegal means.

In other words, it is not a statute to control the activities of the victims of crime. Notice can be taken that there is sufficient State measures to deal with these instances which perhaps are rare. Therefore the legislative history at page 2028 of 2 U.S. Code Congressional and Administrative News, 1968, states that:

"Extortionate Collection:

"Not everyone who falls into the clutches of a loan shark is necessarily aware at the outset of the nature of the transaction into which he has entered. Moreover, cases will arise where the use of extortionate means of collection can be demonstrated even though it cannot be shown that a bilateral understanding that such would be the case existed at the outset. Section 894 (a) covers these situations by making it a criminal offense to collect an indebtedness by extortionate means, regardless of how the indebtedness arose. ..."

Obviously Napoli was not a consumer nor a bankrupt nor a victim of usury nor indebted to syndicated gamblers or usurers.

It is difficult to understand how the victim of a larceny or any other crime, can be placed in the position where he becomes a party to the offense set forth in 18 U.S.C. 894. The victim of the offense being the thief or the wrongdoer.

The basis of the crime would appear to be a debt.

It would appear that the meaning of these words in the context of this case would be confusing to a layperson. In U.S. v. Mase, 556 F. 2d 671 (1977) it was stated at page 673 that:

"Title II contains no definition of a loan, a debt or a claim..."

The "debt" in this case arose from the criminal conduct of Napoli. The extension of credit was also a result of the chicaning of the government's prime witness.

To hold the appellant liable under the unique circumstances of this case, would be holding him liable under a statute that either didn't apply to the unique facts of this case, or else as construed would be confusing to a layman. In other words, the construction given to the statute rendered it vague and therefore void and in violation of due process of law under the 5th Amendment to the Federal Constitution.

It is respectfully submitted and well known that statutes making acts criminal, must be clear and provide reasonable guidance to those who would conform to law so that such person can comprehend what acts are to be avoided. As stated in U.S. v. Sullivan, 332 U.S. 689 (1948) penal statutes must be unambiguous so that the average person can make a choice to avoid unlaw conduct. It would seem that the elements of clarity involve fairness so that the average person cannot be entrapped by the prosecution. Vague statutes can be overbroad and chill lawful conduct. Vague statutes prevent a fair trial in that if they are vague, and accused does not have the reasonable information of the charge and may be deprived of defending against it. See Palmer v. Euclid, 402 U.S. 544 (1971);

Papachristou v. Jacksonville, 405 U.S. 156 (1972). For the values involved in Article I, Section 10 of the United States Constitution banning ex post facto legislation see also James v. U.S., 366 U.S. 213, at page 247, note 3.

Even if the vagueness of a penal statute is removed or clarified by judicial construction, then the defendant is nevertheless circumstances by a conviction based on a subsequent construction made retroactive or ex post facto. In Bouie v. Columbia, 378 U.S. 347 (1964) at page 355 it was stated in part that:

"...That if the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause...would be obvious and the violation is nonetheless clear when the result is accomplished by the State judiciary in a course of construing an otherwise valid...statute." (Omitting internal quotations and citations).

At page 362 it was stated in part that:

"...We think it clear that...in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. ...If...had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of ex post facto laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, anymore than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal..." (Omitting internal quotations and citations).

POINT II:

The appellant joins in all the other points contained in the appellate briefs of the co-defendants herein who are appealing.

CONCLUSION:

THE JUDGMENTS OF CONVICTION
SHOULD BE REVERSED.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Appellant

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that
deponent is not a party to the action, is over 18 years of age,
and resides at 286 Richmond Avenue, Staten Island, N.Y.
10302. That on the 19 day of Dec. ,19 77 at

No. 1 St. Andrews Pl., NYC

deponent served the within

upon U.S. Attorney, So. Dist. of NY

the Appellee herein, by delivering true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
19 day of Dec. 1977.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1978

U.S. Attorney
1 St. Andrews Pl.
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